Supreme Court, U.S.
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No._____

In the Supreme Court of the United States

October Term, 1995

Village of Chagrin Falls, Ohio,
Petitioner,

v.

Ronald W. Kruse;
Sylvia A. Kruse,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

May a United States Court of Appeals ignore the Rules of Decision Act, 28 U.S.C.A. §1652, and hold that a state's inverse condemnation procedure is "unreasonable, unclear, and inadequate" where the state constitution contains a straightforward takings clause and the state court of last resort has expressly recognized the remedy as adequate?

When a state constitution provides an express remedy for an aggrieved landowner who has had property taken by a governmental entity, and the state court of last resort has recognized the remedy as adequate, may a United States Court of Appeals judicially circumvent the jurisdictional requirement that an aggrieved landowner seek and be denied compensation in state court before a Fifth Amendment claim is ripe for federal review?

Must landowners seeking compensation for a completed, physical taking first pursue such compensation under established state procedures before a Fifth Amendment taking claim is ripe for federal review?

In the absence of constitutional challenge to the procedure itself, may a United States Court of Appeals hold that a state's inverse condemnation procedure is "unreasonable, unclear, and inadequate?"

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In The
Supreme Court of the United States
October Term, 1995

VILLAGE OF CHAGRIN FALLS, OHIO,

Petitioner,

v.

RONALD W. KRUSE; SYLVIA A. KRUSE,

Respondents.

Petition for Writ of Certiorari To The Sixth Circuit Court of Appeals

---

PETITION FOR WRIT OF CERTIORARI

Petitioner, Village of Chagrin Falls, Ohio, respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit entered on January 29, 1996, and the subsequent denial of the Motion for Rehearing with Suggestion for Rehearing En Banc on March 6, 1996.

OPINIONS BELOW

On March 18, 1994 Judge Paul Matia of the United States District Court, Northern District of Ohio, granted Petitioner's Motion to Dismiss for lack of jurisdiction on the grounds that Respondents had not sought compensation in an inverse condemnation proceeding in state court and, therefore, their Fifth Amendment taking claim was not ripe for federal review. (App. 3-7). On January 29, 1996, the Court of Appeals for the Sixth Circuit reversed the trial court's dismissal of Plaintiffs-Respondents' complaint and remanded the matter to the trial court with instructions, *Kruse v. Village of Chagrin Falls, Ohio,* 74 F.3d 694 (1996), holding that Ohio's inverse condemnation procedure does not afford a "reasonable, certain and adequate provision for obtaining compensation" after the government takes private property. (App. 8-21). The Sixth Circuit Court of Appeals denied Petitioner's Motion for Rehearing with Suggestion for Rehearing En Banc on March 6, 1996. (App. 22-23).

JURISDICTION

Respondents' taking claims were averred to have arisen under the Fifth and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. §§1983 and 1988 Jurisdiction was alleged to be conferred upon the District Court by 28 U.S.C. §§1331 and 1343 and the self-executing characteristics of the Fifth and Fourteenth Amendments to the Constitution of the United States.

This Court's jurisdiction to consider a decision or decree of a United States Court of Appeals is invoked pursuant to 28 U.S.C. 2101(c).

CONSTITUTIONAL PROVISIONS

Fifth Amendment, United States Constitution:

> . . . private property [shall not] be taken for public use, without just compensation.

Article I, Section 19, Ohio Constitution:

> Private property shall ever be held inviolate, but subservient to the public welfare. When taken . . . for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money . . .

28 U.S.C.A. §1652:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

On June 26, 1986, Petitioner Village of Chagrin Falls, Ohio, commenced improvements to Cleveland Street, a public roadway which is situated within the Village limits. The planned improvements included the widening of Cleveland Street and a widening of the section of State Street, between Cleveland Street and Bell Street. During the widening project, Chagrin Falls' independent contractor allegedly

excavated a ten by one hundred seventy-five (10x175) foot long section of the Kruse family's back yard. Chagrin Falls believed that the it owned the strip of land. The Kruses subsequently claimed that said property had been vacated in 1863, and thus they (Respondents) were the rightful owners.

Respondents filed an action against Chagrin Falls in December of 1987 in the Court of Common Pleas, Cuyahoga County, Ohio, seeking money damages for Chagrin Falls' trespass onto their property. Respondents also sought to quiet title in their name and sought a preliminary and permanent injunction resulting from Petitioner's alleged trespass and destruction of Respondents' property. An inverse condemnation proceeding was not filed, nor were any allegations of a governmental taking set forth in the state court action.

Both parties filed Motions for Summary Judgment. The trial court granted Respondents' Motion for Partial Judgment to quiet title, finding that the Kruse's were the rightful owners of the property at the time of the excavation. The court also denied Respondents' Motion for Summary Judgment on the issue of damages holding that Respondents could not recover money damages from Chagrin Falls for the trespass pursuant to the governmental immunity conferred by Ohio Rev. Code §2744.02. The Court of Appeals affirmed and the Ohio Supreme Court refused jurisdiction on November 27, 1991. No further appellate review was sought. No ruling was ever made in the state court action which required that Petitioner compensate Respondents for the strip of land.

Respondents did not file an action in state court seeking money damages for Chagrin Falls' taking of their property without just compensation. Likewise, Respondents never availed themselves of the established state court procedure for obtaining compensation for governmental

takings of property and they have never challenged the adequacy of the established state procedure in a state court.

On November 2, 1993, Respondents filed an action in the United States District Court, Northern District of Ohio, seeking money damages for the alleged unlawful governmental taking of their property. The position of the Village of Chagrin Falls, Ohio was very simple: to wit, that although compensation was appropriate, the District Court lacked jurisdiction to consider the matter because the claim was not ripe for federal review and the Kruse family should have sought judicial relief in state court. The District Court, following well established precedent, agreed and granted Petitioner's Motion to Dismiss on March 18, 1994.

Respondents' timely filed their appeal and the Sixth Circuit Court of Appeals entered its decision reversing the court below on January 29, 1996 and denied the Motion for Rehearing with Suggestion for Rehearing En Banc on March 6, 1996.

REASONS FOR GRANTING THE WRIT

It is respectfully contended that the Court of Appeals for the Sixth Circuit has entered a decision in conflict with decisions of the Second, Seventh, Ninth and Eleventh Circuit Courts of Appeals, styled, *Villager Pond, Inc. v. Town of Darien,* 56 F.3d 375 (2nd Cir. 1995); *Estate of Himelstein v. City of Fort Wayne, Indiana*, 898 F.2d 513 (7th Cir. 1990); *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680 (9th Cir. 1993); and, *Executive 100, Inc. v. Martin County*, 922 F.2d 1536 (11th Cir. 1991), respectively, concerning the adequacy and reasonableness of a state's inverse condemnation procedure and the ripeness of a federal taking claim where the aggrieved landowner has not first sought and been denied compensation through the established state procedure.

Furthermore, the court below has entered a decision concerning federal jurisdiction which directly conflicts with a decision of the Ohio Supreme Court, *Levin v. City of Sheffield Lake,* 70 Ohio St.3d 104 (1994), and the Ohio Constitution, Article I, Section 19; and, which departs markedly from the Supreme Court in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985) and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304 (1987); and, which violates the deference required by the Rules of Decision Act, 28 U.S.C.A. §1652 and departs from the usual and accepted course of judicial proceedings so as to call for an exercise of this Court's supervisory powers.

Finally, in treating a completed physical taking claim differently than a regulatory taking case, the court below has decided an important federal question that has not been, but should be, settled by this Court. If the decision below is permitted to stand, an exception to the ripeness doctrine will be created for physical taking cases occurring in Ohio despite Ohio Constitutional law which contains a straightforward takings clause and Ohio Supreme Court law which expressly recognizes that "inverse condemnation" is the appropriate remedy and, was the appropriate remedy, at the time of the taking of the Respondents' property.

I. Ohio recognizes inverse condemnation actions as adequate provisions for obtaining compensation for completed, physical takings.

The Fifth Amendment does not require that just compensation be paid in advance of, or contemporaneously with, a taking of private property. All that is required is that

a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking. *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194 (1985), *citing*, *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974). *See*, *also*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984); *Hammond v. Baldwin*, 866 F.2d 172 (6th Cir. 1989).

A reasonable, certain and adequate provision for obtaining such compensation existed in Ohio on the date that Respondents' property was taken. In *Levin v. City of Sheffield Lake*, 70 Ohio St.3d 104, 108-109 (1994), the Ohio Supreme Court revisited the viability of a landowner's adequate remedy under Ohio law for a governmental entity's *physical taking* of private property, stating:

> Moreover, we have held that mandamus is the vehicle for compelling appropriation proceedings by public authorities where an involuntary taking of private property is alleged. *State ex rel. McKay v. Kauer*, (1951), 156 Ohio St. 347; *Wilson v. Cincinnati*, (1961), 172 Ohio St. 303; *In re Appropriation of Easement for Hwy. Purposes*, (1963) 175 Ohio St. 107.
>
> * * * *
>
> Thus, . . . [the court] may issue a writ of mandamus and order the city to commence appropriation proceedings.

Clearly, the *Sheffield Lake* decision demonstrates that Ohio courts have recognized an inverse condemnation remedy since the *Kauer* case was decided in 1951, some thirty-five

years before the accidental taking of the Kruse property. Moreover, it goes without saying that the inverse condemnation remedy was in existence for many years before the Ohio Supreme Court was called upon to pass on its reasonableness or adequacy. Looking back now with unobstructed hindsight there can be no question that an adequate post-deprivation remedy existed in Ohio at the time of the widening of the street.

The Ohio Constitution contains a straightforward takings clause which may be used as the basis of an inverse condemnation action to recover compensation. Article I, Section 19 of the Ohio Constitution contains the following language:

> Private property shall ever be held inviolate, but subservient to the public welfare. When taken . . . for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money . . .

Article I, Section 19 of the Ohio Constitution was adopted at the 1851 constitutional convention, effective September 1, 1851, some one hundred thirty-five years before The Village of Chagrin Falls, Ohio accidentally made use of the Kruse property during public road repairs. At least one other Circuit Court of Appeals has held that such straightforward takings clauses may be used as the basis to recover compensation. As the Second Circuit held in *Villager Pond*, *supra*, at 380:

> This [similar Connecticut] clause may be used as the basis of an inverse condemnation action to recover compensation for property taken from private individuals, even in the absence of a separate statutory remedy.

II. A United States Court must defer to a state court of last resort unless the state law offends the Constitution or treaties of the United States.

A federal court must defer to a state court of last resort unless the state law offends the Constitution or treaties of the United States or Acts of Congress. *See*, 28 U.S.C.A. §1652, commonly referred to as the Rules of Decision Act. The language of the Act is unequivocal. A United States Court of Appeals must defer to the rule of law announced by a state court of last resort unless a Constitutional infirmity exists, and the court below ignored the clear mandate of the Act when it failed to recognize the Ohio Constitutional provision which forms the basis for inverse condemnation actions, and circumvented the Ohio Supreme Court decision announced in *Sheffield Lake*, *supra*.

Furthermore, it has been held that on questions involving local real estate law and construction of state statutes, a United States Court of Appeals is bound by the determination of a state court of last resort. *Hudson v. American Oil Company*, 253 F.2d 27 (4th Cir. 1958). *See, also*, *Ladue v. Chevron, U.S.A., Inc.*, 920 F.2d 272 (5th Cir. 1991), *citing*, *Commissioner of Internal Revenue v. Estate of Bosch*, 387 U.S. 456 (1967) (holding that a court of appeals is bound to apply law as interpreted by state's highest court).

The court below certainly did not defer to the Ohio Supreme Court when it held that Ohio's statutory scheme for seeking compensation for governmental takings was not adequate or reasonable. Perhaps more troubling, however, the court of appeals did not even consider the Ohio Constitutional provision which succinctly provides the basis for inverse condemnation actions. As such, the court's decision affects the important federal question of ripeness in

a way that directly conflicts with the United States Supreme Court in a long line of cases beginning with *Williamson County, supra,* Ohio Constitutional law and decisions from the Ohio Supreme Court. This Court's supervisory powers are necessary and proper in this matter.

The Ohio Supreme Court stated that its inverse condemnation procedure ". . . is the vehicle for compelling appropriation proceedings by public authorities where an involuntary taking of private property is alleged." *Sheffield Lake, supra,* at 108-109. Moreover, unlike the aggrieved party in *Levald v. City of Palm Desert,* 998 F.2d 680 (9th Cir. 1993), where it was held that the claim was ripe because pursuit of state law remedies *at the time of the taking* would have been futile, Ohio judicially recognized the inverse condemnation proceeding at the time of the Kruse taking. *Kauer, supra.* If a state has not rejected an aggrieved party's theory of recovery, it cannot with any degree of intellectual honesty be said that the state remedies are not adequate or amount to a "functional equivalent of the denial of just compensation." *Id.* at 687. Indeed, since 1851 the Ohio Constitution has provided an adequate, reasonable and certain remedy.

The Ninth Circuit recognized that Hawaii's procedures were adequate even though no case of that state had *specifically* recognized inverse condemnation as a cause of action. *Austin v. City of Honolulu, 840 F.2d 678 (9th Cir. 1988).* Additionally, the Ninth Circuit acknowledged that federal courts of appeals have routinely "held that state procedures are considered inadequate only when state law provides no post-deprivation remedy for a taking." *Dodd v. Hood River County,* 59 F.3d 852 (9th Cir. 1995), *citing, Austin,* 840 F.2d at 681; *Levald,* 998 F.2d at 688, *cert. denied,* __ U.S. __, 114 S.Ct. 924, 127 L.Ed.2d 217 (1994). The holding of the court below directly conflicts with the

Ninth Circuit in *Dodd, supra*, because Ohio law does provide a post-deprivation remedy.

III. The ripeness requirement applies to completed, physical taking claims in the same manner as it applies to regulatory taking claims.

It is well established that property owners who complain that physical invasions by the state have taken their property must pursue compensation under state procedures. Until an aggrieved landowner in Ohio seeks compensation through the established Ohio procedures for the alleged taking, and has been denied compensation, his Fifth Amendment claim is not ripe for review at the Federal level because no constitutional deprivation has occurred. *Williamson County, supra; Harris v. City of Akron*, 20 F.3d 1396 (6th Cir. 1994); *Bigelow v. Michigan Department of Natural Resources*, 970 F.2d 154 (6th Cir. 1992); *Silver v. Franklin Township, Board of Zoning Appeals*, 966 F.2d 1031 (6th Cir.1992); *Duncan v. Village of Middlefield*, 951 F.2d 348 (6th Cir.1991). *See, also, Biddison v. City of Chicago*, 921 F.2d 724 (7th Cir. 1991). It is not the taking that is unconstitutional, rather, it is the lack of compensation after a governmental taking which offends the Just Compensation Clause. *Hodel v. Virginia Surface Mining and Reclamation Assn., Inc.*, 452 U.S. 264, 297 n. 40 (1981).

Although this Court has recognized a distinction between regulatory takings and *per se* takings, *Yee v. City of Escondido, Cal.*, ___ U.S. ___, 112 S.Ct. 1522 (1992), a violation of the Compensation Clause has not been found to have occurred until the state refuses to compensate, or pursuit of state remedies would prove futile. Thus, despite the suggestion by the court below that a physical taking claim

may be first brought in a federal tribunal, the Fifth Amendment bears no such message.

The reasons for this limitation can be found in the plain language of the Fifth Amendment to the United States Constitution, which provides in relevant part that "private property [shall not] be taken for public use, without just compensation." The Constitution does not prohibit a state from taking private property, rather it merely requires that compensation be paid for such a taking. In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304, 314 (1987) this Court stated:

> As its language indicates, and as the Court has frequently noted, this provision alone does not prohibit the taking of private property, but instead places a condition on the exercise of that power.

citing, Williamson County, supra; Hodel, supra; Hurley v. Kincaid, 285 U.S. 95, 104 (1932); *Monongahela Navigation Co. v. United States,* 148 U.S. 312, 336 (1893); *United States v. Jones*, 109 U.S. 513, 518 (1883).

Despite an unbroken line of cases emanating from this Court and all of the Circuits establishing that a taking claim is not ripe for review until a party is denied compensation in state court, the court below has ignored precedent; has failed to defer to the Ohio Supreme Court and the Ohio Constitution in violation of the Rules of Decision Act; and, has expanded federal jurisdiction of taking claims. Although it has long been the law of the land that "unless a claim is ripe, a federal court has no jurisdiction to hear it," *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947), the court below apparently disagrees and has departed from *Williamson County, supra.*

There was no constitutional challenge to Ohio's inverse condemnation procedure raised by Respondents at any time, nor did the court below consider any such purported constitutional infirmity. Rather, the court below suggested that because Ohio does not have a specific statutory provision entitled "Inverse Condemnation," the existing statutory procedure might be confusing and, therefore, inadequate. The Ohio Supreme Court has decided otherwise as illustrated by its consistent line of decisions commencing with *Kauer, supra* in 1951.

IV. There is no requirement that a state have a statutory cause of action which is specifically entitled "Inverse Condemnation" in order to comply with this Court's pronouncement in First English.

In reaching its conclusions, the court below placed great weight on the fact that Ohio lacks a statutory cause of action which is labelled *Action for Inverse Condemnation.* Such logic emphasizes form over substance and does nothing to further the federal jurisprudence in the Sixth Circuit or elsewhere. There is nothing inadequate about an action in mandamus seeking to compel a governmental official to commence an appropriation proceeding, as recognized by the Ohio Supreme Court on December 12, 1951, in *Kauer, supra,* at 359 as follows:

> It seems clear under the statutory provisions above outlined that, if the highway director had determined to take any physical part of relator's property for the prosecution of the improvement in question, he could have done so under the procedure provided by Sections

> 1178-37 and 1178-38, General Code; *and it likewise seems clear that if the highway director had taken any part of the physical property for such purpose without following such procedure, the relator by action in mandamus could have required him to do so.*

In *First English*, the Supreme Court held at para. 2 of its syllabus, the following:

> A landowner is *entitled* to bring an action in inverse condemnation as a result of the self-executing character of the constitutional provision with respect to compensation. *Citing, United States v. Clarke,* 445 U.S. 253, 257 (1980) (Emphasis added).

Certainly, a state may not prohibit a person from bringing an inverse condemnation action, and no Ohio law precludes an aggrieved landowner from asserting his or her rights. The *Clarke* decision at 257, cited by the Court in *First English*, further provides the following:

> The phrase "inverse condemnation" appears to be one that was coined simply as a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not be instituted. As defined by one land use planning expert, "[i]nverse condemnation is 'a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even

> though no formal exercise of the power of eminent domain has been attempted by the taking agency.
>
> * * * *
>
> A landowner is *entitled* to bring such an action as a result of the "self-executing character of the constitutional provision with respect to compensation. . ."
>
> * * * *
>
> There are important practical differences between condemnation proceedings and actions by landowners to recover compensation for "inverse condemnation." Condemnation proceedings, depending on the applicable statute, require various affirmative action on the part of the condemning authority. To accomplish a *taking by seizure*, on the other hand, a condemning authority need only occupy the land in question. *Such a taking thus shifts to the landowner the burden to discover the encroachment and to take affirmative action to recover just compensation.*

It was not mere *dicta* when the *First English* Court, relying on *Clarke, supra*, held in its syllabus that a landowner "*is entitled to bring an action in inverse condemnation.*" Thus, since 1987 any aggrieved landowner has had an adequate remedy to seek compensation from the government for takings, both physical and regulatory. In fact, it is no surprise that Ohio decisions following *First English* have

expressly recognized that inverse condemnation actions exist under Ohio law, and are adequate, certain and reasonable. *See, The Shopco Group v. City of Springfield, Ohio,* 66 Ohio App.3d 702 (1990); *Harris, supra* at 1405, ("plaintiff may pursue his claim for damages in an inverse condemnation proceeding as recognized by the Ohio Supreme Court ..."); *Silver, supra,* 966 F.2d at 1035 (6th Cir.1992) (Ohio law provides procedure for obtaining just compensation for governmental taking); *Columbia Gas Transmission Corporation v. An Exclusive Natural Gas Storage Easement in the Clinton Subterranean Geological Formation Beneath 80 Acres, Worthington Twp., Richland County, Ohio*, 747 F.Supp. 401 (N.D. Ohio 1990) (... inverse condemnation [in Ohio] is a landowner's remedy for uncompensated takings of property). *See, also, Duncan v. Village of Middlefield, supra,* ("... there is a procedure under Ohio law to obtain compensation for a taking").

Ohio long ago recognized a property owner's right to bring an action against a governmental entity to recover damages for the taking of property. Article I, Section 19, Ohio Constitution. *Also, see, City of Norwood v. Sheen*, 126 Ohio St. 482 (1933). Likewise, inverse condemnation was specifically acknowledged by the Ohio Supreme Court as an appropriate remedy in *Solly v. City of Toledo*, 7 Ohio St.2d 16 (1966) and continues as a viable remedy to this date. *Harris, supra*, (wherein the Sixth Circuit expressly recognized the viability of Ohio's inverse condemnation remedy). The court below exceeded the limits of its powers when it usurped the Ohio Supreme Court and emasculated the Rules of Decision Act by failing to defer to the Ohio Constitution. The reasonableness of Ohio's inverse condemnation procedure should be left to the citizens and courts of Ohio, not the federal judiciary. At the very least, the Court of Appeals should have certified the question to the

Ohio Supreme Court rather than substituted its judgment for Ohio's court of last resort.

CONCLUSION

For the foregoing reasons, Petitioner, Village of Chagrin Falls, Ohio, prays that this Court grant a writ of Certiorari to review the Decision of the Sixth Circuit Court of Appeals.

Respectfully submitted,
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APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

RONALD W. KRUSE, et al.,	)	JUDGE PAUL R. MATIA
	)	CASE NO. 1:93CV2351
Plaintiffs,	)	
vs.	)	MEMORANDUM OF OPINION ORDER
VILLAGE OF CHAGRIN FALLS, OHIO	)	
Defendant.	)	

Before the Court is Defendant's Motion to Dismiss Pursuant to Civil Rules 12(B)(1) and (B)(6) (Doc. #8) in the above-captioned matter. For the reasons to follow, the Court hereby grants Defendant's Motion.

I.

On June 26, 1986, Plaintiffs, Ronald W. and Sylvia A. Kruse, came home from work to find that Defendant had excavated their backyard for the purpose of widening the street. Defendant engaged in this conduct absent warning, state appropriations proceedings, or just compensation.

In December of 1987, Plaintiffs filed an action against Defendant in the Cuyahoga County Court of Common Pleas, Case No. 121355, seeking to quiet title, money damages for Defendant's trespass, and a preliminary and permanent injunction. While the Court ruled that the property properly belonged to the Plaintiffs and that Defendant had in fact trespassed, it also ruled that Defendant was immune from money damages for trespass pursuant to O.R.C. §2744.02.

This decision was affirmed by the Court of Appeals and the Ohio Supreme Court refused jurisdiction on November 27, 1991.

Defendant avers, and Plaintiffs do not dispute, that Plaintiffs did not file an action in state court seeking money damages for Defendant's alleged taking of their property without just compensation. However, on November 2, 1993, Plaintiffs commenced that instant action in this Court seeking to recover for violations of Title 42, U.S.C. §1983 ("Section 1983 claim"), and the Fifth and Fourteenth Amendments to the United States Constitution ("procedural due process claim"). Additionally, Plaintiffs seek mental distress damages as a result of Defendant's conduct.

On December 22, 1993, Defendant filed the within motion, contending that (1) Plaintiffs' taking claims are not ripe for federal court review pursuant to *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985) ("Williamson") and *Hammond v. Baldwin,* 866 F.2d 172 (6th Cir. 1989), and (2) Plaintiffs' Section 1983 claim is time-barred.

II.

A plaintiff alleging a Section 1983 claim against a government defendant for deprivation of property without just compensation must first avail himself of the state procedure for recovery of compensation. *Williamson, supra*, at 197-198. In lieu of resorting to that procedure, however, it is sufficient if a plaintiff can show either that the procedure is inadequate or unavailable before it can bring a Section 1983 claim. Id. The policy behind this requirement is sound.

> The Fifth Amendment does not require that just compensation be paid in advance of, or contemporaneously with, the taking. If a State provides an adequate procedure for seeking just compensation, the property owner cannot

> claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.

Id., Syllabus at 174.

Plaintiffs argue that *Williamson* is not dispositive because it addresses a "regulatory taking" rather than an actual "physical occupation" of land by the government. It is true that the taking alleged by plaintiff in *Williamson* is a regulatory taking. However, that part of the opinion which addresses the requirement of seeking compensation through state procedures is completely inadequate of whether the taking claim is based on government regulation of land use or actual physical occupation of the land. *See Williamson, supra*, at 194.

Under Ohio law, inverse condemnation is a landowner's remedy for uncompensated takings of property by the government for public use. *Columbia Gas Transmission Corporation v. An Exclusive Natural Gas Storage Easement in the Clinton Subterranean Geological Formation Beneath 80 Acres, Worthington Twp., Richland County, Ohio,* 747 F.Supp. 401, 405 (N.D. Ohio 1990). Plaintiffs have failed to avail themselves of this procedure in state court. Thus, suit under Section 1983 is premature unless Plaintiffs can show that the state remedy is inadequate or unavailable. *Hammond, supra*, at 179.

Plaintiffs have failed to show that the state cause of action for recovering compensation in Ohio is either inadequate or unavailable. Instead, Plaintiffs argue that they need not resort to this state procedure because it relates only to regulatory takings. *See* Plaintiffs' Brief in Opposition to Defendant's Motion to Dismiss, at 5-10. However, Plaintiffs fail to cite even one case which specifically supports their argument.

Therefore, because Plaintiffs have failed to avail

themselves of the state procedure for recovering just compensation, and because they have failed to show that this procedure is inadequate, the Court finds Plaintiffs' Section 1983 claim premature. Because the claim is premature, the Court has no jurisdiction over its subject matter. Accordingly, the Court grants Defendant's Motion to dismiss the Section 1983 claim.

III.

Defendant also contends that Plaintiffs' Section 1983 claim is time-barred. The Court notes that this particular type of Section 1983 claim poses special problems with respect to the relevant statute of limitations.[1] However, because the Court has an independent basis upon which to dismiss the Section 1983 claim, the Court passes on the statute-of-limitations issue at this time.

IV.

Plaintiffs argue that the Court should not dismiss their procedural due process claim because it has not been addressed by Defendant in its Motion to Dismiss. In support of its argument, Plaintiffs direct the Court's attention to the procedures which governing bodies are to follow in appropriating private property in Ohio. *See, Complaint*, ¶ 16,

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[1] Because an aggrieved party's Section 1983 claim does not ripen until the final decision of a state court inverse condemnation proceeding, there is a question as to when a Section 1983 action accrues under these circumstances. If the cause of action accrues at the precise moment that the government "Takes" a plaintiff's property, then it is quite possible that the statute of limitations may expire before the case is ripe for federal court review. However, if the court interprets limitations law in such a way that the initial usurpation of the property by the government and the continued use of the property by the government absent compensation is a continuing violation, then a plaintiff would not be precluded from bringing a Section 1983 suit merely on the basis that the limitations period expired.

at 4 (referring to O.R.C. §§163.06, 163.04, 719.04, 719.05). Plaintiffs allege that Defendant failed to follow the appropriations procedures, which allegation is undisputed by the Defendant. These facts, however, do not change the basic result.

The Plaintiffs have failed to cite, and the Court cannot find, any case law in Ohio which would support a cause of action whose sole basis would be failure on the part of the government to *institute* appropriations proceedings. However, a landowner in Ohio does have a remedy for uncompensated takings of property for public use--*i.e.*, inverse condemnation. Again, Plaintiffs have failed to file such an action; consequently, for the reasons provided in Section II of this Memorandum, Plaintiffs' procedural due process claim is also dismissed.

V.

As to Plaintiffs' request for mental distress damages, the Court has discretion over whether to exercise its pendent jurisdiction over state-law claims. *United Mine Workers v. Gibbs,* 383 U.S. 715 (1966). One of the relevant considerations in exercising its discretion to decline jurisdiction is the dismissal of the federal claims in an action including both state and federal law claims. Id. at 726. Because of the Court's ruling with respect to Plaintiffs' federal claims the Court hereby exercises its discretion to dismiss Plaintiffs' state-law claim without prejudice to refiling in state court.

VII.

Accordingly, for the above-noted reasons, the Court hereby grants Defendant's Motion to Dismiss pursuant to Civil Rules 12(b)(1) and (B)(6) (Doc. #8).

IT IS SO ORDERED.

_____

UNITED STATES DISTRICT JUDGE

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION:
1996 FED App. 0034P (6th Cir.)
File Name: 96a0034p.06

No. 94-3435

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Ronald W. Kruse and Sylvia A. Kruse,

Plaintiffs-Appellants,

v.

Village of Chagrin Falls, Ohio,

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Ohio

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Decided and Filed January 29, 1996

Before: MARTIN and BATCHELDER, Circuit Judges; EDMUNDS, District Judge.**

ALICE M. BATCHELDER, Circuit Judge. The Kruses appeal the district court's dismissal, for lack of jurisdiction, of their lawsuit against the Village of Chagrin Falls. Because, as we explain, the relevant facts are not in dispute and we conclude that this action is indeed ripe, we reverse the decision below and remand with instructions.

I.

One afternoon in June of 1986, the Kruse family of Chagrin Falls returned home to discover, to their intense amazement and dismay, that their backyard was missing. The back of their property had been laid waste, and the family's house was hanging at the edge of a precipice where their lawn, trees and other landscaping had been when they left home that morning. Agents of the Village had been busily at work that day, devastating the Kruses' yard and carting off tons of soil excavated from the property, as well as the family's trees, bushes, and other plantings.

The excavated land was, long ago, part of Old State Street; however, the Village had formally vacated the street in the mid-1800s. The vacated street was disused, and the Village had permitted building on the property. When the Kruses protested the destruction of their property, the Village authorities responded that they presumed that the Village owned the vacated street (even though it had granted a building permit to the Kruses' predecessors in title to build an extension on what had been the street, and even though the Village was aware of the Kruses' occupancy). The Village had determined to commence a little roadwork across the Kruses' backyard but had not given the owners any

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** The Honorable Nancy G. Edmunds, United States District Judge for the Eastern District of Michigan, sitting by designation.

notice of its plan to consume their yard as part of a street-widening program.

The Kruses filed a trespass action against the Village in state court seeking to quiet title to the disputed property, to recover monetary damages, and to obtain injunctive relief from the Village's destruction of and continuing trespass on their property. The Village filed a counterclaim alleging that the Kruses had encroached upon and wrongfully taken the property and seeking the removal of the family's home from the property. The Cuyahoga County Court of Common Pleas granted partial summary judgment to the Kruses, quieting title to the property in them. *See Kruse v. Village of Chagrin Falls*, Case No. 121335 (Ct. Com. Pls. (Cuyahoga Cty. Ohio) Nov. 3, 1989) (unreported). On appeal, the state appellate court affirmed the grant of summary judgment to the Kruses, holding that the Village had clearly vacated the street in 1863 and that the Kruses, as deed holders of record, were entitled to quiet title of the property. *See Kruse v. Village of Chagrin Falls*, Case No. 58892 (Ohio Ct. App. (8th Dist.) July 11, 1991) (unreported). However, the appellate court further held that, because the Village was involved in road maintenance, a governmental function, it was immune from liability from any damage done to the Kruses' property based upon their trespass claim; the court declined to consider whether the complaint raised a constitutional claim. *See id.* The record indicates that the Ohio Supreme Court declined to accept the case for review. The state courts thus left the matter after quieting title in the Kruses to the property that the Village continues to use, but granting the Kruses neither money damages to compensate them for their loss nor injunctive relief to prevent the Village's continuing trespass on their property.

Because the Village refused to pay compensation for its appropriation of their property, the Kruses filed this lawsuit, seeking relief under 42 U.S.C. §§ 1983 and 1988 for the Village's violation of their rights under the Fifth and Fourteenth Amendments to the United States Constitution.

Count II of the Kruses' complaint sought monetary relief for severe emotional and mental distress caused by the Village's taking and destroying their property without notice and an opportunity to be heard pursuant to the Ohio state statutes relative to appropriation of private property for municipal use. The Village filed its motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1) and (b)(6), arguing that the plaintiffs "did not file an action in state court seeking money damages for Chagrin Falls' alleged taking of their property without just compensation," that "[t]heir trespass action did not constitute an inverse condemnation action" and that "their 'taking' claim is not ripe for federal review."

The district court opined that landowners in Ohio have a remedy for uncompensated takings of property for public use through inverse condemnation proceedings. Relying on *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), the court held that "because plaintiffs have failed to avail themselves of the state procedure for recovering just compensation, and because they have failed to show that this procedure is inadequate," their constitutional due process and § 1983 claims were premature and, consequently, the court lacked jurisdiction. Since it had dismissed the federal claims, the court declined to exercise pendent jurisdiction over the state-law claim for mental-distress damages, dismissing that claim without prejudice to refiling in state court. This timely appeal followed.

II.

We review *de novo* the district court's dismissal of claims for lack of subject-matter jurisdiction. *Kroll v. United States*, 58 F.3d 1087, 1090 (6th Cir. 1995). The Village argues, and the district court found, that *Williamson* requires a plaintiff to avail himself of state procedures for obtaining compensation, or to demonstrate that those procedures are inadequate, prior to bringing an action under § 1983, and that the Kruses' claims are not ripe because they did not pursue a state-law cause of action for inverse

condemnation. We think, however, that *Williamson* does not require this result in the case at hand.

The issue in *Williamson* on which the Supreme Court granted certiorari was "whether Federal, State, and Local governments must pay money damages to a landowner whose property allegedly has been 'taken' temporarily by the application of government regulations." 473 U.S. at 185. The Court ultimately held that the property owner's 42 U.S.C. § 1983 action was not ripe because the property owner had neither obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to the property nor utilized the procedures Tennessee provides for obtaining just compensation. As to the first ground, the Court explained,

> Our reluctance to examine taking claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause. . . . [T]his Court consistently has indicated that among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. Those factors simply cannot be evaluated until the *administrative agency* has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.

Id. at 190-91 (internal citations omitted) (emphasis added).

Second, the Court held that because the Takings Clause of the Fifth Amendment does not require pretaking compensation, so long as the state has, at the time of the taking, "a reasonable, certain and adequate provision for obtaining compensation," *id.* at 194 (internal quotation marks omitted) (quoting *Blanchette v. Connecticut Gen. Ins. Corps.*, 419 U.S. 102, 124-25 (1974)), the taking is not complete until the state fails to provide adequate compensation. Thus, the Court in *Williamson* held,

> Under Tennessee law, a property owner may bring an

inverse condemnation action to obtain just compensation for an alleged taking of property under certain circumstances. Tenn. Code Ann. § 29-16-123 (1980). The statutory scheme for eminent domain proceedings outlines the procedures by which government entities must exercise the right of eminent domain. §§ 29-16-101 to 29-16-121. The State is prohibited from "enter[ing] upon [condemned land]" until these procedures have been utilized and compensation has been paid the owner, § 29-16-122, but if a government entity does take possession of the land without following the required procedures,

> "the owner of such land may petition for a jury of inquest, in which case the same proceedings may be had, as near as may be, as hereinbefore provided; or he may sue for damages in the ordinary way. . ." § 29-16-123.

. . . Respondent has not shown that the inverse condemnation procedure is unavailable or inadequate, and until it has utilized that procedure, its taking claim is premature.

Williamson, 473 U.S. at 196-97.

The case before us, however, is not a claim of taking by application of governmental regulation; it is not a case in which the property owner has failed to resort to the administrative procedures which might obviate the need to address the constitutional question; it is not a case in which the state has provided a statutory procedure to obtain post-deprivation compensation. The case before us is a completed physical taking of the appellants' property by the Village, without notice and wholly in violation of the statutory requirements governing appropriation of property.

Of particular importance here, unlike Tennessee and a number of other states which have explicit statutory procedures governing inverse condemnation to compensate landowners whose property has been taken in violation of the

Constitution and the state's eminent-domain statutes,[1] ***Ohio does not have such a statute***. Ohio property owners who find themselves in the Kruses' position do not have available to them "reasonable, certain and adequate" state procedures to provide post-deprivation compensation.[2] In fact, in Ohio, the availability of remedies and the procedure to obtain compensation for property taken without regard for the state's appropriation statutes, are confusing and uncertain at best.

Ohio Rev. Code §§ 163.01-163.62, APPROPRIATION OF PROPERTY, which include provisions for appropriation (§ 163.04) and petition for appropriation (§ 163.05), provide

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[1]Wyoming, for example, has a wonderfully clear inverse condemnation statute:

> When a person possessing the power of condemnation takes possession of or damages land in which he has no interest, or substantially diminishes the use or value of the land, due to activities on adjoining land without the authorization of the owner of the land or before filing an action of condemnation, the owner of the land may file an action in district court seeking damages for the taking or damage and shall be granted litigation expenses if damages are awarded to the owner.

Wyo. Stat. § 1-26-516 (West 1995).

[2]The Village argues that after *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378 (1987), all states are required to provide an inverse condemnation remedy. The Village is mistaken. *First English* was another case raising a claim for compensation arising out of a regulatory taking. There, the Supreme Court noted, in a footnote, that the claim was ripe for review under *Williamson* because the plaintiffs had brought an inverse condemnation action and the California courts had dismissed it. 482 U.S. at 312 n. 6. Further, the Court pointed out that it "ha[s] recognized that a landowner is entitled to bring an action in inverse condemnation as a result of '"the self-executing character of the constitutional provision with respect to compensation. . . ."'" *Id.* at 315 (internal citations omitted). This does not amount to a mandate to the states to provide an inverse condemnation procedure.

eminent-domain procedures for the *government*, *prior* to taking property, to commence appropriation proceedings and compensate the owner. The Ohio statutes require municipalities to follow established procedures prior to appropriating privately-owned property for municipal use. These statutes are intended to assure that property owners will receive notice of the government's intent to appropriate their property prior to the taking, to provide for proper authorization of the government to do so, and to provide for the deprived owners to be fairly compensated for the appropriated property. *See generally* Ohio Rev. Code §§ 163.01-163.62; 719.01-719.33.

The Ohio Supreme Court has very recently stated that a landowner who has been deprived of his property may bring an action in mandamus to require the government to institute appropriation proceedings pursuant to Ohio's Appropriation of Property statute. *See Levin v. City of Sheffield Lake*, 637 N.E.2d 319, 323-24 (Ohio 1994). There, the court reviewed *some of* its prior decisions, which indicated that appropriation proceedings may be compelled through mandamus, but also reiterated the stringent requirements for issuance of the extraordinary writ[3] and explained that prior to issuance of the writ to compel the commencement of appropriation proceedings, the issue of whether the petitioner's property had been appropriated had first to be determined by the court in which the writ was requested. *Id.*

Levin, however, was not decided until 1994, well after the Kruses had begun their heretofore fruitless attempt to obtain compensation from the Village for its taking of their property. And *Levin*'s cited cases which have held that mandamus is the vehicle for compelling appropriation

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[3]A mandamus petitioner must prove that he is entitled to the performance of a clear legal duty and that he has no adequate remedy at law. *See, e.g., State ex rel. Citizens for Responsible Taxation v. Scioto County Bd. of Elections*, 616 N.E.2d 869, 871 (Ohio 1993).

proceedings by public authorities, are all cases in which the court addressed a taking by the state, through the action of the Director of Highways. In *Wilson v. City of Cincinnati*, 175 N.E.2d 725, 727 (Ohio 1961), the court noted that where *the state* took the property, the property owner's redress was an action in mandamus to require the Director of Highways to begin appropriation proceedings, because the state could not be sued without its consent.[4] *State v. Kauer*, 102 N.E.2d 703 (Ohio 1951), involved an involuntary taking by the State through the actions of the Director of Highways, and a mandamus action filed by the property owner after he initially filed a damage action against the Director to which the Director had demurred on the basis of sovereign immunity. It is significant to note that in *Kauer*, the parties conceded that the property owner had no adequate remedy at law or equity, and, as Judge Taft pointed out in his separate concurrence, since it is elementary that no writ of mandamus will issue where the petitioner has an adequate remedy at law or equity, and since the court had not specifically decided that issue, paragraph three of the syllabus may be interpreted as deciding that issue. *Id.* at 709.

The *Levin* court did not address at all its decision in *City of Worthington v. Carskadon*, 249 N.E.2d 38 (Ohio 1969), a case which post-dates all of the decisions *Levin* relied upon, in which the City of Worthington took possession of property pursuant to a "quick take ordinance," prior to determination of value by a jury. There, the court held that "[t]he proper remedies for illegal entry upon one's property are criminal trespass and civil damages against the individuals entering, and injunction against the city and its agents." *Id.* at 39.

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[4]The Ohio Supreme Court specifically noted relative to the plaintiff's claim against the City of Cincinnati in that case that the plaintiff was proceeding on the authority of *Lucas v. Carney*, 149 N.E.2d 238 (Ohio 1958), in which the court had held that a property owner whose property was taken for a public use by a county could institute an action against such county to have his damages assessed by a jury.

None of these cases even mentions the remedy of inverse condemnation. The claim by the Village that *Solly v. City of Toledo*, 218 N.E.2d 463 (Ohio 1966) holds that Ohio has such a remedy is simply incorrect.[5] Nor does our decision in *Harris v. City of Akron*, 20 F.3d 1396 (6th Cir.), *cert. denied*, ___ U.S. ___, 115 S. Ct. 512 (1994), hold that an Ohio plaintiff in the position of the Kruses is required to pursue an action in inverse condemnation before he may bring an action under 42 U.S.C. § 1983, although we concede that the reader might easily be misled on that score if he read only the publisher's headnotes. The issue of whether the plaintiff's § 1983 action was premature was neither before us nor decided by us in *Harris*. Rather, we explicitly stated that that issue was not before us,[6] but in *dicta*, citing *Williamson*, we advised the plaintiff that he could pursue "an inverse condemnation proceeding as recognized by the Ohio Supreme Court in *Solly* . . ." as a prerequisite to a § 1983 action. *Id.* at 1405.

We hold that Ohio affords no "reasonable, certain and adequate provision for obtaining compensation" after private property is taken by public authorities without following the mandatory pretaking appropriation procedures set out in Ohio Rev. Code §§ 163.01-163.62. Ohio's decisional law

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[5]*Solly* held that a city official who destroys or injures private property in abating a nuisance may be liable in damages, as may the city, where there has been no judicial determination that the property is in fact a public nuisance nor an opportunity for the property owner to be heard on the subject. 218 N.E.2d at 466.

[6]In *Harris*, the plaintiff did not object to the magistrate judge's dismissing his Fifth Amendment takings claim, and we expressly recognized that the takings claim was not before us. "The matter comes to us as a 'pure due process case,' not as one in which the due process claims are ancillary to any other claim." 20 F.3d at 1403. Our *dicta* regarding the takings claim appears only in the conclusion of the opinion, and only after our explicit statement that "[t]he district court, accepting the magistrate judge's recommendation, dismissed Harris' 'taking' claim as premature; it did not decide that claim on the merits." *Id.* at 1405.

in this area is anything but certain. Ohio has no statutory provision for relief under the circumstances of this case. The fact that the State's courts recognize an action in mandamus, where the State has no mandated procedures governing inverse condemnation, cannot be equated to a "reasonable, certain and adequate provision for obtaining compensation," after the property has been physically taken in violation of the appropriations statutes. An action for the extraordinary writ of mandamus is, at best, a procedure which must be invoked in the absence of any statutory framework in an attempt to obtain wholly equitable relief for an injury already inflicted.

The Takings Clause of the Constitution prohibits the taking of private property for public use without due process of law and just compensation. U.S. CONST. amend. V. Cases involving physical occupation/invasion takings are treated differently than those involving claims of regulatory takings. *Compare, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 and n.5 (1982) ("When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking. . . . The modern significance of physical occupation is that courts . . . *never* deny compensation for a physical takeover. The one incontestable case for compensation . . . seems to occur when the government deliberately brings it about that its agents, or the public at large, 'regularly' use, or 'permanently' occupy, space or a thing which theretofore was understood to be under private ownership.") (citations omitted); *Armstrong v. United States*, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.") *with, e.g., Dolan v. City of Tigard*, ___ U.S. ___, 114 S. Ct. 2309 (1994) (land use regulation case); *Williamson* (same); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 488-89 n. 18 (1987) ("[A] 'taking' may more readily be found when the interference

with property can be characterized as a physical invasion by the government[.] While the Court has almost invariably found that the permanent physical occupation of property constitutes a taking, the Court has repeatedly upheld regulations that destroy or adversely affect real property interests.") (internal citations omitted).

In regulatory cases, where the government has fulfilled its obligation to provide notice to the property owner, it may be fair to place the burden of making the next move on the landowner to attempt prevention of the government action that is supposedly adverse to the owner's property interest. It may make sense to require landowners to pursue relief through administrative appeals and the mandatory injunction process when the landowners know in advance that the government is planning action that threatens their ownership of their property, especially in cases involving regulation of the use of the land, since there are generally numerous opportunities available to landowners to be heard and to attempt to prevent a proposed zoning ordinance from taking effect, or to reach a compromise with the authorities that permits some alternative use of the land. In contrast, when "a condemning authority . . . occup[ies] the land in question . . . [this] taking thus shifts to the landowner the burden to discover the encroachment and to take affirmative action to recover just compensation . . . . [The landowner is thereby] placed at a significant disadvantage by this shifting of the initiative from the condemning authority to the condemnee." *United States v. Clarke*, 445 U.S. 253, 257-58 (1980) (discussing practical differences between condemnation proceedings and physical takings by governmental bodies).

These distinctions between regulatory takings and takings by physical occupation or invasion further support the conclusion that the landowners in this case are not required to pursue any further attempts in state court to obtain the compensation which the Constitution mandates they be paid. There is no question that the Village effected a taking of the Kruses' property. The state court has definitively ruled that title to the property belongs to them.

The Village no longer contests either the fact that the property belongs to the Kruses or that the Village's actions constituted a taking. All that remains is for the Village to provide compensation to the Kruses for the taking, something which the Village steadfastly refuses to do. In spite of the clear dictates of the Constitution, in spite of the illegality of the Village's actions, and in spite of the fact that the Kruses filed, in accordance with some of the dictates of the Ohio Supreme Court, an action designed to obtain that compensation, the Village insists that until the Kruses file just the right kind of action to obtain the compensation to which even the Village admits they are entitled, the Village need not and will not pay.

After reviewing this record and listening to counsel at oral argument, it is obvious to us that, left to the devices of the Village's counsel, this case will become another *Jarndyce v. Jarndyce*, with the participants "mistily engaged in one of the ten thousand stages of an endless cause, tripping one another up on slippery precedents, groping knee-deep in technicalities, running their . . . heads against walls of words, and making a pretence of equity. . . ." CHARLES DICKENS, BLEAK HOUSE 2 (Oxford University Press ed. 1989) (London 1853). For nearly ten years, the Kruses have endeavored to vindicate their property rights guaranteed by the Constitution and by state statutes. The Village's actions threaten to turn the Kruse family into generations of "ruined suitors" pursuing legal redress in a system "which gives to monied might, the means abundantly of wearying out the right; which so exhausts finances, patience, courage, hope" as to leave them "perennially hopeless." *Id.* at 3-4. Enough is enough, and then some.

III.

For these reasons, the judgment of the district court is REVERSED and the case is REMANDED with instructions. On remand, the district court will enter judgment for the Kruses and conduct a trial to award them damages. Now that the federal claims are not to be dismissed, the court may

also consider whether to exercise pendent jurisdiction over the plaintiffs' state-law claim for damages resulting from severe mental distress caused by the defendant.

No. 94-3435

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RONALD W. KRUSE; SYLVIA A. KRUSE, Plaintiffs-Appellants, v. VILLAGE OF CHAGRIN FALLS, OHIO, Defendant-Appellant	)	ORDER

BEFORE: MARTIN and BATCHELDER, Circuit Judges; and EDMUNDS, *District Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

dated March 6, 1996
LEONARD GREEN, CLERK

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*Hon. Nancy G. Edmunds, United States District Judge for the Eastern District of Michigan, sitting by designation

Supreme Court, U.S.
FILED
JUN 21 1996
CLERK

(2)

No. 95-1971

In The

Supreme Court of the United States

October Term, 1995

VILLAGE OF CHAGRIN FALLS, OHIO,

Petitioner,

vs.

RONALD W. KRUSE,
SYLVIA A. KRUSE,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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29 pp

QUESTIONS PRESENTED FOR REVIEW

Does the seizure of private property and its conversion to a public road by a municipal corporation without warning, notice or payment of compensation to the owners offend the substantive and procedural guarantees vested in citizens of the United States by the Due Process Clause of the Fourteenth Amendment and the Due Process and Takings Clauses of the Fifth Amendment to the Constitution of the United States of America.

Has the Congress of the United States vested jurisdiction in the United States courts of a case complaining that a municipal corporation has taken private property and devoted it to its own use without notice or securing compensation, albeit a remedy is available to the complainant through the common law of the state to charge the municipal corporation with violating the Constitution of the United States and of the state and to compel it to institute proceedings to appropriate the seized property and pay compensation therefor.

Does a municipal corporation deprive a citizen of rights guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution by failing to observe procedures enacted by the General Assembly of the State of Ohio requiring notice, negotiation and other conduct with respect to an owner of private property prior to taking such property.

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CONSTITUTIONAL PROVISIONS

Fifth Amendment to the United States Constitution

> No person shall be . . . , nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to the United States Constitution

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law, . . .

STATUTES ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO

Ohio Revised Code, § 163.04

Ohio Revised Code, § 163.06

Ohio Revised Code, § 163.59

Ohio Revised Code, § 719.04

Ohio Revised Code, § 719.05

STATEMENT OF THE CASE

Judge Batchelder vividly depicted the events precipitating this case at 74 F.3d 695[1], as follows:

> One afternoon in June of 1986, the Kruse family of Chagrin Falls returned home to discover, to their intense amazement and dismay, that their backyard was missing. The back of their property had been laid waste, and the family's house was hanging at the edge of a precipice where their lawn, trees and other landscaping had been when they left home that morning. Agents of the Village had been busily at work that day, devastating the Kruses' yard and carting off tons of soil excavated from the property, as well as the family's trees, bushes, and other plantings.
>
> The excavated land was, long ago, part of Old State Street; however, the Village had formally vacated the street in the mid-1800's. The vacated street was disused, and the Village had permitted building on the property. When the Kruses protested the destruction of their property, the Village authorities responded that they presumed that the Village owned the vacated street (even though it had granted a building permit to the Kruses' predecessors in title to build an extension on what had been the street, and even though the Village was aware of the Kruses' occupancy). The Village had determined to commence a little roadwork across the Kruses' backyard but had not given the owners any notice of its plan to consume their yard as part of a street widening program.

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[1] *Kruse v. Village of Chagrin Falls, Ohio*, 74 F.3d 694 (1996).

The Village[2] insisted that it and not the Kruses owned the land and denied the Kruses' request for redress. The Kruses brought an action in the Court of Common Pleas of Cuyahoga County, Ohio, demanding that title to the land be quieted in their name, that the taking be enjoined, and that they be awarded damages. That court granted summary judgment to the Kruses quieting title to the land in their name and overruled the Village's motion for summary judgment on the issue of damages. The street widening having been completed, the request for injunction had become moot. The Village appealed to the Court of Appeals of Cuyahoga County, Ohio, which in an unreported opinion affirmed the grant of summary judgment quieting title to the land in the Kruses but reversed the denial of summary judgment to the Village on the issue of damages, and rendered judgment for the Village on that issue by reason of sovereign immunity. The decision overruling the damage claim is consistent with the latest pronouncement of the Ohio Supreme Court on the question, in which it held an action for damages may not be maintained against a municipality by reason of unconstitutional restrictions on the use of property. *Superior Uptown, Inc. v. Cleveland*, 39 Ohio St. 2d 36 (1974). The Village appealed to the Ohio Supreme Court, which declined jurisdiction.

In spite of the Kruses' continuing requests, the Village declined to appropriate the property, and so the Kruses brought this action in the United States District Court for the Northern District of Ohio, alleging deprivation of property without due process on both substantive

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[2] Petitioner is referred to as the Village or Chagrin Falls.

and procedural grounds, and a taking without compensation. The district court dismissed the Kruses' complaint, asserting that they must first exhaust the procedures available under state law. The Sixth Circuit reversed, holding that the district court was vested with jurisdiction over this matter, a taking of private property for a public purpose through physical occupation without the payment of compensation.

ARGUMENT

Ten years have elapsed since the Kruses were dispossessed of their land by the Village. That this case evinces deprivation of property without due process is incontrovertible. The Village has ignored the Kruses' due process claim and has focused on the Takings Clause of the Fifth Amendment. It asks this Court to accept jurisdiction so as to find that its action in seizing the Kruse property does not offend the Takings Clause in spite of the lapse of ten years without payment.

Without acknowledging that payment is due, it argues that payment is not required until compelled by state judicial process (Petition, p. 11). It directs this Court to the case of *State ex rel. Levin v. Sheffield Lake*, 70 Ohio St. 3d 104 (1994), suggesting that in that case the Ohio Supreme Court held that inverse condemnation procedures are available in Ohio (Petition, p. 10) through mandamus (Petition, p. 7), which it refers to as "Ohio's statutory scheme for seeking compensation" (Petition, p. 9). In *State ex rel. Levin v. Sheffield Lake*, the court reviewed a mandamus action brought to compel the trial court

before which an earlier action was pending to issue a writ of mandamus directing appropriation. The Ohio Supreme Court held that mandamus was an appropriate remedy to compel appropriation. Doing so, it made an exception to its established doctrine that mandamus may not be utilized to compel legislative action. *State ex rel. Town & Suburb Development Co. v. Maser*, 172 Ohio St. 505 (1961); *State ex rel. Keville v. Faurot*, 126 Ohio St. 646 (1933). The Ohio Supreme Court cited to support its holding that the remedy of mandamus is appropriate to compel appropriation *State ex rel. McKay v. Kauer*, 156 Ohio St. 347 (1951); *Wilson v. Cincinnati*, 172 Ohio St. 303 (1961); *In re Appropriation of Easement for Hwy. Purposes*, 175 Ohio St. 107 (1963). These cases concerned administrative action by the director of highways, not legislative action. Nowhere in the opinion in *State ex rel. Levin v. Sheffield Lake* does the court mention the phrase "inverse condemnation," nor does it review the adequacy of the remedy for the purpose of the Takings Clause; and, since the initial mandamus action filed in that case had been pending for ten years, it certainly did not find the remedy adequate.

The Village asserts that the Sixth Circuit in this case should have deferred to the decision of the Ohio Supreme Court in *State ex rel. Levin v. Sheffield Lake*, but that court made no finding on the federal question of the adequacy of mandamus as a remedy for purposes of the Takings Clause. Moreover, even in diversity cases, resolution of federal issues is vested in the courts of the United States. *Budinich v. Becton Dickinson and Company*, 486 U.S. 196, 198 (1988).

Mandamus is not a statutory scheme, but rather a common law remedy dating from the thirteenth century.

State ex rel. Moyer v. Baldwin, 77 Ohio St. 532, 537-538 (1908). The Village also argues that an inverse condemnation action is available in Ohio, and presumably in every state in the union, by reason of this Court's decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304 (1987), that an inverse condemnation action may be brought by reason of the self-executing characteristics of the Fifth Amendment. Citing language of the court in *Villager Pond, inc. v. Town of Darien*, 56 F.3d 375, 380 (CA2 1995), the Village argues that an additional source for an Ohio remedy is available through Article I Section 19 of the Ohio Constitution, which it contends provides a self-executing remedy in inverse condemnation. Every state constitution, of course, has provisions similar to Section 19 of the Ohio Bill of Rights (Article I), mandamus is available in every jurisdiction in this country and, of course, this Court's decision in *First English Evangelical Lutheran Church* controls the proceedings in all of the states. The Village is requesting this Court to take jurisdiction on this case in the expectation that it will divest the federal courts of jurisdiction in all cases claiming substantive deprivation of property without due process in defiance of the Takings Clause and the Due Process Clause.

Congress, however, has explicitly vested jurisdiction in the courts of the United States to redress tortious violation under the color of state law of rights guaranteed to the citizens of the United States by the Constitution, irrespective of the availability of a remedy under state law, and without requiring that state remedies be pursued prior to the invocation of the federal remedy. *Monroe v. Pape*, 365 U.S. 167 (1961), overruled in part on the

unrelated issue of municipal liability in *Monell v. New York City Dept. of Social Services*, 436 U.S. 664 (1978); *Zinermon v. Burch*, 494 U.S. 113 (1990); *Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 427 (1987); *Lynch v. Household Finance Corporation*, 405 U.S. 538 (1972); *McNeese v. Board of Education for Community Unit School District 187, Cahokia, Illinois*, 373 U.S. 668 (1963).

The Village attempts to avoid the consequence of these cases by twisting the "ripeness" concept enunciated by this Court in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), relating to regulatory takings. It cannot seriously be advanced that the Kruses' claim of constitutional tort is not ripe. The Village has seized the land, widened the street and, although ten years have elapsed, has not paid compensation. This is not a case, as in *Williamson County*, in which this Court reviewed the effect of the land use regulation upon property, but rather a physical occupation and seizure of property and its application to public use, and so incontrovertibly a taking for which the Constitution requires compensation. *Yee v. City of Escondido, California*, 112 S.Ct. 1522 (1992); *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

In *Chicago, Burlington & Quincy Railroad Company v. Chicago*, 166 U.S. 226 (1897), this Court, relying upon Justice Story at 2 *Story Const. § 1956*, held, "that the power to appropriate was subject to the restriction, among others, that it must not be exercised without making due compensation for whatever is taken, says: 'Due

process of law requires, first, the legislative act authorizing the appropriation, pointing out how it may be made and how the compensation shall be assessed, . . . ' " In substituting judicial redress for legislative action, the Village has blurred the constitutional compact establishing separation of powers. The Takings Clause contemplates legislative action to provide the procedure for compensation. The requirement is not satisfied by judicial admonishments rectifying unconstitutional omissions.

The responsible authority is the Council of the Village, but it has neither authorized the appropriation of the Kruse property nor has it appropriated money to pay for it. That payment is available may not be assumed. The frontiersmen who drafted the Ohio Constitution did not have faith in the credit of government. In Section 19 of the Bill of Rights (Article I), they required payment to be made prior to the possession and transfer of title of property appropriated to a public use, providing exceptions for times of war, public exigency or the construction of roads, in which event a deposit in court is required of an amount equivalent to the fair market value of the property being taken. The clause in Section 19 providing for payment states, "where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; . . . ."

The risk that the Kruses will not be paid is magnified by the fact that the credit of the state is not behind the Village. Under Ohio law, Chagrin Falls has the status of a city state with respect to the exercise of its power of eminent domain. The Home Rule Amendment to the Ohio Constitution, Article XVIII Section 3, vests a municipality

with all powers of local self government, including the power to acquire property by appropriation or otherwise. *State ex rel. Bruestle v. Rich,* 159 Ohio St. 13 (1953). The state legislature is bereft of authority to intervene. The court held at 159 Ohio St. 32, "[T]here is no provision of the Ohio Constitution which authorizes the interference by general laws with the exercise by a municipality of its power of eminent domain. . . . "

The Ohio legislature has provided no remedy to the Kruses. It is without authority to provide a remedy. The General Assembly has not provided for compensation from its own coffers to persons like the Kruses whose property has been seized by a subdivision of the state, nor can it compel a municipality to pay for what it has taken. The decision of the Sixth Circuit in this case that Ohio has not provided a remedy through inverse condemnation for the taking of private property by the public is manifestly correct and is not likely to be disturbed by this Court. The obligation to obey the Due Process Clause and the Takings Clause as well as the Ohio Constitution is with the Village. Its failure constitutes a violation of constitutional guarantees made to the Kruses, to whom Congress has provided a remedy through enactment of the Civil Rights Act.

The Village attempts to avoid the multiple holdings of this Court that the jurisdiction of the federal courts in civil rights actions is not dependent upon exhaustion of state remedies through misemployment of the concept of "ripeness" enunciated by this Court in *Williamson County,* in which it held that the action brought pursuant to the

Civil Rights Act by a developer of a subdivision in Tennessee claiming a taking of its property through confiscatory land use regulations was premature and not ripe for adjudication by the federal courts either pursuant to the Due Process Clause or the Takings Clause, in that a final administrative decision had not been made by the Williamson County Board of Zoning Appeals, which had not been asked to consider certain variances available to the developer. Drawing upon its holding in *Parratt v. Taylor*, 451 U.S. 527 (1981), this Court went on to state that the Taking claim would not be ripe for adjudication until the owner had exhausted state procedures for obtaining compensation and been denied. The broad language of this Court is appropriate to regulatory takings, but not to the surprise physical invasion and expropriation of private property by government without provision for compensation. In *Parratt*, this Court held that an adequate post-deprivation remedy satisfied the Due Process Clause under facts where a pre-deprivation hearing was not feasible because the loss occurred through random and unauthorized acts of a state agent.

A pre-deprivation hearing is obviously impracticable in assessing the effect of a land use regulation upon property. The restrictions are imposed to operate uniformly throughout a zoning district. It may be that when applied to a piece of property, a restriction may be found arbitrary, capricious and unreasonable without advancing a legitimate governmental interest. *Nectow v. Cambridge*, 277 U.S. 172 (1928). It is readily apparent, however, that investigation regarding all the properties that might be affected by a regulation prior to its going into effect is impracticable and of doubtful benefit. Therefore, the only

practical remedy is through a post-deprivation proceeding. To support its position in *Williamson County*, this Court cited precedents involving problematic takings which held that compensation was assured through the credit of the United States, which was incorporated into the legislation authorizing the potential taking, if not explicitly, at least by implication. *Ruckelshaus v. Monsanto Company*, 467 U.S. 986 (1984) (possible loss of trade secrets); *Blanchette v. Connecticut General Insurance Corporations*, 419 U.S. 102 (1974) (possible erosion of assets); *Hurley v. Kincaid*, 285 U.S. 95 (1932) (possible flooding); *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974) (possible erosion of assets).

The taking of the Kruse property was not problematic, but definite. Compensation was neither made nor secured. The deprivation occurred with the seizure. After ten years, it is highly unlikely that this Court will decide that due process is not culminated until state judicial remedies are exhausted. *Williamson County* does not lead to this absurd result. Concerned about the *res judicata* implications of this Court's holding in *Williamson County*, the court noted in *Dodd v. Hood River County*, 59 F.3d 852 (CA9 1995), at page 860:

> Reduced to its essence, to hold that a taking plaintiff must first present a Fifth Amendment claim to the state court system as a condition precedent to seeking relief in a federal court would be to deny a federal forum to every takings claimant. We are satisfied that *Williamson County* may not be interpreted to command such a revolutionary concept and draconian result.

The Village attempts to provide a Parrattic element to this case by describing the taking as accidental (Petition, p. 8).

The facts belie accident. The Village knew that the Kruses occupied the property; that the knoll upon which it was situated supported the residence; had even granted a building permit to extend the house onto vacated State Street; and yet without warning, deliberately directed its contractor to level the hillside and to cut down the trees, bushes and other vegetation on the property. The concept of ripeness is inapplicable to this case. The facts are known; there is nothing more to be learned. Unlike the situation in *Williamson County*, there is no question that the Kruses have suffered a taking and are entitled to compensation. They are also entitled to invoke the jurisdiction of the federal courts to obtain redress.

The Petition ignores the due process claims of the Kruses. The expropriation of their land without warning offends the scope of liberties guaranteed by the Due Process Clause. *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 502 (1977), adopting Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497 (1961), at 542-543. It constitutes official conduct which "shocks the conscience" *Rochin v. California*, 342 U.S. 165, 172 (1952).

The Kruses also asserted a procedural due process deprivation by reason of the failure of the Village to follow the process prescribed by Ohio law for the appropriation of property. The Due Process Clause originates from Chapter 39 of the Magna Carta, in which King John agreed not to dispossess any free man except "by the law of the land." *Letwin, The Economic Policy of the Constitution*, reprinted in *Paul & Dickman, Liberty, Property and the Foundations of the American Constitution* (State University of New York Press 1989). The guarantees of the Due Process Clause entitled the Kruses to be notified of the

imminent taking of their property and to be granted the opportunity to be heard prior to the taking. *Cleveland Board of Education v. Laudermill*, 470 U.S. 532, 542 (1985). It also vests the entitlement to the Kruses that the procedures established by state law be followed. *Zinermon v. Burch, supra*. Section 719.04 of the Ohio Revised Code[3] required that the Council of the Village pass a resolution declaring the intent to appropriate the Kruses' property for road purposes. Section 719.05 provides that the resolution of intent be served prior to the enactment of an ordinance authorizing the appropriation. The Charter of the Village at Section 2 of Article II incorporates the general laws of the state of Ohio when not inconsistent with the Ordinances of the Village. Section 163.59 requires the Village to procure an appraisal of the property from an independent fee appraiser and to offer an amount not less than the appraisal. Further, it prohibits the taking of possession of the property until an agreed price is paid or the amount of the appraisal is deposited in court. Section 163.04 requires negotiation with the owner. Section 163.06(A) implements the constitutional requirement that prior to taking possession, the appraised value of the property be deposited in court.

The Village has ignored the law of the land in its dealing with the Kruses. The decision of the Sixth Circuit in this case should be affirmed and the district court directed to conclude this matter and provide the Kruses

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[3] References are to Ohio Rev. Code Ann. (Anderson 1991) and Ohio Rev. Code Ann. (Baldwin 1994).

with the compensation that they should have been paid ten years ago.

CONCLUSION

The claim of conflict raised by the Village between the decision of the Sixth Circuit in this case and the decisions in the cases cited in the Second, Seventh, Ninth and Eleventh Circuits is illusory (Petition, p. 5). All of those cases involved the application of land use regulations to the properties concerned and not physical expropriation of property for a public purpose. None held that the common law writ of mandamus constitutes an adequate inverse condemnation remedy to be exhausted prior to asserting the federal claim. None held that physical seizure of property for a public purpose did not constitute a deprivation or a taking without compensation absent pursuit of the state court remedies.

The Village urges this Court to accept jurisdiction so that it may impose upon the Constitution the procedural niceties heretofore applied by the Court in consideration of regulatory takings to takings physically occupying

property. Such a holding would offend traditional values of this republic. The Petition should be denied.

Respectfully submitted,

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§ 163.04 Appropriation.

Appropriations shall be made only after the agency is unable to agree, for any reason, with the owner, or if more than one, any owner, or his guardian or trustee, or when any owner is incapable of contracting in person or by agent and has no guardian or trustee, or is unknown, or is not a resident of this state, or his residence is unknown to the agency and cannot with reasonable diligence be ascertained.

§ 163.06 Deposit with court; appraisal of structures.

(A) A public agency, other than an agency appropriating property for the purposes described in division (B) of this section, which qualifies pursuant to Section 19 of Article I, Ohio Constitution, may deposit with the court at the time of filing the petition the value of such property appropriated together with the damages, if any, to the residue, as determined by the public agency, and thereupon take possession of and enter upon the property appropriated. The right of possession upon deposit as provided in this division shall not extend to structures.

* * *

§ 163.59 Land acquisition policies.

In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the many state and federally assisted programs, and to promote public confidence in public land acquisition practices, heads of acquiring agencies shall, to the greatest extent practicable, be guided by the following policies:

(A) The head of an acquiring agency shall make every reasonable effort to acquire expeditiously real property by negotiation.

(B) Real property shall be appraised before the initiation of negotiations, and the owner or his designated representative shall be given an opportunity to accompany the appraiser during his inspection of the property, except that the head of the lead agency may prescribe a procedure to waive the appraisal in cases involving the acquisition by sale or donation of property with a low fair market value. As used in this section, "appraisal" means a written statement independently and impartially prepared by a qualified appraiser setting forth an opinion of defined value of an adequately described property as of a specified date, supported by the presentation and analysis of relevant market information.

(C) Before the initiation of negotiations for real property, the head of the acquiring agency concerned shall establish an amount which he believes to be just compensation therefor and shall make a prompt offer to acquire the property for the full amount so established. In no event shall such amount be less than the agency's

approved appraisal of the fair market value of such property. Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property. The head of the acquiring agency concerned shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount he established as just compensation. Where appropriate the just compensation for the real property acquired and for damages to remaining real property shall be separately stated.

(D) No owner shall be required to surrender possession of real property before the acquiring agency concerned pays the agreed purchase price, or deposits with the court for the benefit of the owner, an amount not less than the agency's approved appraisal of the fair market value of such property, or the amount of the award of compensation in the condemnation proceeding for such property.

(E) The construction or development of a public improvement shall be so scheduled that no person lawfully occupying real property shall be required to move from a dwelling, or to move his business or farm operation, without at least ninety days' written notice from the head of the acquiring agency concerned, of the date by which such move is required.

(F) If the head of an acquiring agency permits an owner or tenant to occupy the real property acquired on a rental basis for a short term or for a period subject to termination on short notice, the amount of rent required shall not exceed the fair rental value of the property to a short-term occupier.

(G) In no event shall the head of an acquiring agency either advance the time of condemnation, or defer negotiations or condemnation and the deposit of funds in court for the use of the owner, or take any other action coercive in nature, in order to compel an agreement on the price to be paid for the property.

(H) If any interest in real property is to be acquired by exercise of the power of eminent domain, the head of the acquiring agency concerned shall institute formal condemnation proceedings. No acquiring agency head shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property.

(I) If the acquisition of only part of a property would leave its owner with an uneconomic remnant, the head of the acquiring agency concerned shall offer to acquire that remnant. For the purposes of this division, an uneconomic remnant is a parcel of real property in which the owner is left with an interest after the partial acquisition of the owner's property and which the head of the agency concerned has determined has little or no value or utility to the owner.

§ 719.04 Resolution declaring intent to appropriate.

The legislative authority of a municipal corporation shall, whenever it is deemed necessary to appropriate property, pass a resolution declaring such intent, defining the purpose of the appropriation, and setting forth a pertinent description of the land and the estate or interest therein desired to be appropriated.

§ 719.05 Proceedings on passage of appropriation resolution.

The mayor of a municipal corporation shall, immediately upon the passage of a resolution under section 719.04 of the Revised Code, declaring an intent to appropriate property, for which but one reading is necessary, cause written notice to be given to the owner of, person in possession of, or person having an interest of record in, every piece of property sought to be appropriated, or to his authorized agent. Such notice shall be served by a person designated for the purpose and return made in the manner provided for the service and return of summons in civil actions. If such owner, person, or agent cannot be found, notice shall be given by publication once a week for three consecutive weeks in a newspaper of general circulation in the municipal corporation, and the legislative authority may thereupon pass an ordinance by a two-thirds vote of all members elected thereto, directing such appropriation to proceed.